UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF ADMINISTRATIVE LAW JUDGES

FRED MEYER STORES, INC.

Case 19-CA-206136

and

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 555

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This matter was heard on April 3, 4, and 5, 2018, before Administrative Law Judge Jeffrey Wedekind in Portland, Oregon, on a Complaint alleging that Fred Meyer Stores, Inc. ("Respondent"), engaged in unfair labor practices within the meaning of § 8(a)(1) of the Act. Counsel for the General Counsel ("General Counsel") respectfully submits this post–hearing Brief to the Administrative Law Judge.

I. INTRODUCTION

The General Counsel alleges that Respondent interfered with its employees' § 7 rights in violation of § 8(a)(1) on about March 26, 2017, when one of its supervisors denied the request of its employee Jason Thomas ("Thomas") to have a representative of the United Food & Commercial Workers, Local 555 (the "Union"), present during an investigatory interview, and then conducted the investigatory interview despite having denied his request for Union representation.

The General Counsel also alleges that Respondent violated § 8(a)(1) on about March 26, 2017, when that same supervisor: instructed employee Thomas to take an alcohol test; denied his request to be represented by a Union representative for the alcohol test; and, suspended him after he refused to submit to an alcohol test. Finally, the General Counsel alleges that Respondent violated § 8(a)(1) on about March 31, 2017, when a manager discharged employee Thomas because he refused to submit to an alcohol test during the interview in which Thomas was denied Union representation.[1]

[1] Throughout the record and this brief the test may be referred to as a "drug test," "alcohol test," or "alcohol and drug test." It should be noted that these terms are all meant to describe or are analogous to the alcohol test that Respondent ordered Thomas to submit to without union representation on March 26, 2017.

II. STATEMENT OF FACTS[2]

Respondent is an Ohio corporation with an office and place of business in Portland, Oregon, and has been in the business of operating retail grocery and department stores, including one known as the Hollywood store (the "store"), in the Portland metropolitan area. Respondent admits that it is an employer engaged in commerce within the meaning of §§ 2(2), (6), and (7) of the Act. (GCX 1(e), ¶ 2(d)). At all relevant times, Sean Findon ("Findon") was the store's Manager on Duty, Patty Chavarria ("Chavarria") was the store's Person in Charge, and Lydia Mangum ("Mangum") was the Human Resources Director. All three are and have been supervisors of Respondent within the meaning of § 2(11) of the Act and/or agents of Respondent within the meaning of § 2(13) of the Act (GCX 1(e), ¶ 4; TR. 165:5–10). At all relevant times, Shawn Mentzer ("Mentzer") and Dylan Burroughs ("Burroughs") were Loss Prevention officers and not members of the bargaining unit (TR. 10:24).

The Union represents all of Respondent's Checkstand Department employees at the store (the "Unit") (GCX 1(e), ¶ 5; JX 1). Respondent has recognized the Union as the exclusive collective–bargaining representative of the Unit for many years. The most recent collective-bargaining agreement ("CBA") between Respondent and the Union is effective from August 2, 2015, through August 4, 2018 (GCX 1(e), ¶ 5; JX1).

The store is one of Respondent's largest facilities, and serves the public as a multi-department store selling groceries and non-food items (TR. 20:9-11, 437:5-7; JX 1; RX 5:8). The store is situated on a city block facing northwest (RX 3). Inside the

[2] References to the Transcript of the proceedings before the Administrative Law Judge ("ALJ") are noted as (TR. :), which shows the Transcript page and line, respectively. References to Joint exhibits will be made as (JX). References to General Counsel's exhibits will be made as (GCX). References to Charging Party's exhibits will be made as (CPX). References to Respondent's exhibits will be made as (RX).

store, at the end of the Deli counter are two check stands where customers can pay for food items and other small purchases (GCX 5; RX 15). At the "front-end" of the store, there are cashier stands and self-checkout stands (TR. 101:20-102:3). There is an employee break room that includes a first floor or "downstairs" area with lockers for employees to store personal belongings (TR.112:3-13, 355:3-5; RX 2). The employee entrance and the store floor are to the right of the locker area (TR. 383:1-4). The Human Resources office is upstairs from the entrance (TR. 122:19).

The Loss Prevention ("LP") department consists of the LP office and the video surveillance room (TR. 164:22-165:1; RX 17). Access to the LP office is through a locked door and the video surveillance room is accessed by walking through the LP office to an adjacent room (TR. 412:9-413:4; RX 17). The LP department provides security for the store, monitors surveillance video, and investigates internal and external thefts at the store (RX 5:38). Another function of the LP department is to investigate any potential safety issues at the store (RX 5:38).

A. Thomas' Employment History with Respondent

Thomas worked as a cashier and self-check-out attendant in the Checkstand Department at the store from June 20, 2016, until March 31, 2017 (TR.99:16–24, 152:18–22; RX 1; CPX 1). Thomas' duties as cashier included assisting customers and processing sales as a cashier at his assigned check stand and/or assisting customers as the attendant at the self-check-out area of the store (RX 1; TR. 99:20 –24). Thomas received awards and commendations throughout his tenure at the store, including Employee of the Month for December 2016 (TR. 100:2–6).

B. Respondent's Policy Regarding Drug and Alcohol Testing of Employees

The "Alcohol & Drug Use" section of the Associate Handbook sets forth the policies with respect to drug and alcohol testing of Respondent's employees. In addition to testing as a condition of initial employment, the policy provides that any employee involved in an on the job accident is required to submit to a drug or alcohol test[3] (RX 5:32; RX 6, 7, 11). The policy further provides that the Respondent may require a drug or alcohol test when there are reasonable grounds to believe that an employee is under the influence of drugs or alcohol at work (RX 5:32). According to the policy, any employee who possesses, consumes, or is impaired by drugs or alcohol is subject to "disciplinary action up to and including termination" (RX 5:32).

This policy is also memorialized in a document entitled "Fred Meyer Policy on Alcohol and Drug Use" that every employee is required to read and sign at the start of their employment (RX 6). The document specifically states that "Refusing to submit to a search or inspection of his or her personal property located on Company premises … including lockers … and/or refusing to submit to medical testing, including but not limited to giving urine or saliva samples[,]" is "prohibited and may be grounds for disciplinary actions up to and including termination" (RX 6).

Another document that every employee is required to read and sign at the start of their employment is entitled "Fred Meyer Associate Responsibilities" (RX 8). This document includes the conduct of "Reporting to work under the influence of alcoholic beverages" or "consuming or possessing alcoholic beverages … during your work shift or on Company premises" under the heading "Associate Conduct Which Will Result in

[3] For example, when Thomas cut his hand at work on February 19, 2017, he was required to take a drug test (TR. 141:19–21, 142:19–25,143:8–12, RX 11).

Immediate Termination Without Prior Warning" (RX8). Similar versions of these policies are also be found in Section 4.3 "Alcohol and Drug Use" of the Corporate Policy Handbook (RX 7).

1. Reasonable Suspicion Drug and Alcohol Testing

It is store policy that two members of management must personally witness that an employee smells of alcohol before a manager can request that the employee submit to an alcohol test (TR. 508:2). Section 18.2 of the CBA sets forth policies and procedures with respect to reasonable grounds drug and alcohol testing applicable to Respondent's union–represented employees. It provides that Respondent may require an employee to submit to a drug or alcohol test "if the Employer has reasonable grounds to believe the employee is under the influence of alcohol or drugs" and/or "when the employee is involved in an industrial accident which involves injury."

Under Section 18.2, all time spent testing is on company time and an employee who tests positive is entitled to have a second test at the employee's expense to verify the accuracy of test results.[4] Section 18.2 also provides that "any employee who refuses to complete any required testing-related forms, or refuses to submit to drug or alcohol test shall be taken off the clock effective with the time of the Employer's request, and shall be subject to termination" (JX 1). For any conflict between the CBA and Respondent's policies—the CBA controls (TR. 95:21–24).

2. Respondent's Employee Assistance Program

Respondent has an Employee Assistance Program ("EAP") to assist employees and their families in resolving issues such as those caused by alcoholism. The EAP provides referrals to local treatment resources. The EAP is available to all employees

[4] The Employee Handbook also provides for a retest, but at Respondent's expense (RX 5:33).

and up to six visits a year are free. Participation in the EAP does not prevent Respondent from taking appropriate disciplinary action against an employee for performance issues (RX 5:22; RX 7; TR. 148:5–11).

C. The Events of March 26, 2017

Thomas lives less than a mile from the store so he would regularly walk home during his hour long lunch breaks to eat his lunch, walk his dog, and give his dog its daily required medication (TR. 100:1–7; RX 3). It was not uncommon for Thomas to buy groceries during his lunch break to take home (TR. 101:8–18). Thomas never tried to hide the fact that he would sometimes buy beer during his off the clock lunch break to take home (TR. 100:11–102:6, 136:13–25, 137:10–13, 138:11–13; RX 19).

March 26, 2017 was no different. Thomas worked the 11:00 a.m. to 8:00 p.m. shift that day (TR.20–21). He purchased beer during his lunch break at about 3:10 p.m., placed it in a paper grocery sack, and took it home (TR. 208:16–23, 209:11–19; RX 15; GCX 5 at 3:10:12 p.m. to 3:11:14).[5] Thomas did not drink the beer before he got home that day (TR. 137:17–23, 284:8–11).

1. Person in Charge Chavarria Refers Thomas to Sean Findon Regarding Potential Alcohol Issue

Findon claimed that Chavarria told him before the end of Thomas' shift that two customers and a coworker had complained that Thomas smelled of alcohol (TR. 285:16–286:1–4). Chavarria reported the complaints to Findon. (TR. 284:8–11, 359:18; CPX 1). Findon did not know that Thomas had bought beer during his lunch on March 26 (TR. 327:8–14). Findon was also not aware that Ashley Pinkerton

[5] In stark contrast to Respondent's attempt to grossly mischaracterize GCX 5 (video) using RX 15 (still photo video capture), Thomas did not purchase any potato salad on March 26, 2017 (TR. 209:7, 267:24–268:1, 269:5–11, 270:17–20).

("Pinkerton"), Meat Department employee, had reported seeing beer in Thomas' locker before that day[6] because Pinkerton did not provide her statement until the next day – March 27, 2017 (TR. 321:12–18, 374:18–25; CPX 1). Despite the fact that the suspicion was not corroborated by a second manager, Findon testified that he decided to instruct LP to start an investigation because Chavarria told him that she could smell alcohol on Thomas (TR. 416:22; CPX 1).

2. Loss Prevention Employees Dylan Burroughs and Shawn Mentzer Investigate Thomas

Findon told Mentzer to investigate the complaint that Thomas smelled of alcohol (TR. 286:7–11). Findon met Mentzer and Burroughs in the lunchroom to look in the locker above Thomas' locked locker (TR. 289:5–8, 289:23, 414:6–415:16). Pinkerton had previously reported to management and LP that Thomas was using the locker above his assigned locked locker #91, but there was no report or corroboration of any such use that day (TR. 350:16–18, 355:24–25, 356:1–6, 360:14–16). After inspecting the locker, Findon decided that Thomas should be brought to the LP office for an investigatory interview (TR. 286:12–19; GCX 6). Findon asked Chavarria to go to the checkstand and bring Thomas back to the LP office (TR. 291:7–14).

3. Thomas is Escorted to the Loss Prevention Office

Before about 7:42 p.m., Chavarria asked Thomas to meet with Burroughs and Mentzer in the LP office (TR. 103:13–104:4, 163:18–164:4). Thomas was told that his

[6] Pinkerton, who no longer works for Respondent, claimed that she wrote a statement to Loss Prevention about Thomas drinking beer near his assigned locker several days *before* this event as well, but the statement was not found or confirmed and Respondent was unable to produce any written statement. (TR. 356:2–8, 359:13–22, 360:14–18, 368:8-14). Respondent's Exhibit 15 was admitted under the auspices that Pinkerton would testify to corroborate that Thomas bought and drank beer at work on March 26, 2017 (TR. 211:4–6). That, however, turned out not to be the case. Instead, Pinkerton could only testify that she saw beer in Thomas' locker on March 25 and that, at some point in the not so distant past, she saw Thomas drinking beer in front of his column of lockers. This in no way corroborated RX 15. (TR. 356:1–8, 360:14–18, 361:16–18, RX 2).

help was needed to see if he could identify a person who was suspected of harassing co-workers at the self–checkout area (TR. 103:10–21, 260:10–16). Thomas was eager to help, and reported to the LP office at about 7:42 p.m. (TR. 103:21–23; RX 17 at 7:42:26).

When Thomas arrived at the LP office he sat in the corner to the left of the entrance door and began discussing incentives for deterring or thwarting shoplifters with Burroughs and Mentzer (TR. 104:5–12; RX 17 after 7:42:26). Thomas had recently stopped a shoplifting suspect and asked if he was entitled to an award based on the value of the items recovered (TR. 104:7–14; RX 17 after 7:42:26). This discussion lasted about ten minutes until Findon arrived at the LP office at about 7:49 p.m. (TR. 104:13–18, 167:13–25; RX 17 at 7:49:16).

Thomas was not told that he was being investigated for alcohol use before Findon arrived (TR. 307:21–23). Findon walked into the LP office and sat down next to a desk across from Thomas (RX 17 after 7:49:16). Findon immediately began reading over the Employee Alcohol and Drug Investigation Manual (TR. 105:2–8, 420:21–421:7; RX 17 after 7:49:16).

4. Manager on Duty Findon Begins Conducting a Drug and Alcohol Investigation

This was the first time Thomas had met Findon (TR. 104:19–105:1, 291:1–6, 295:11–14). Within a few minutes Findon told Thomas that the reason he was called to the LP office was because of reports that Thomas had been drinking on the job and

smelled of alcohol (TR. 105:2–8, 307:24–308:3).[7] Findon asked Thomas if he had been drinking that day. Thomas replied that he had not (TR. 105:11–14, 175:4–7; GCX 6). Findon was unprepared to conduct the questioning and had to read through the manual before continuing to conduct an alcohol and drug policy investigatory interview (TR. 291:15–24, 384:15–20, 387:12, 390:1–6).[8]

5. Thomas Requests a Union Representative and Respondent Denies the Request

At about 7:52 p.m., as soon as Thomas realized he was not in fact there to identify a troublesome customer, but that this was an investigatory meeting that could lead to discipline, he immediately reached for his wallet and pulled out a business card given to him by Mary Spicher ("Spicher"), his Union representative (TR. 105:15–24, 171:16–25, 237:5–8, 278:10–19, 308:4–18, 310:11–19, 313:1–5, 314:18–20, 421:10–19; RX 10, 17 at 7:52:16).[9] The business card had Spicher's phone number and other Union contact information on the front and instructions on how to assert *Weingarten* rights printed on the back (RX 10). Thomas walked across the room, stood in front of Findon, and presented him the card (TR. 106:14, 386:23–25; RX 17 at 7:52:31).

Within seconds, Thomas began to read the back of Spicher's business card aloud and stated, "If this discussion could in any way lead to my being disciplined or

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[7] At hearing, Findon testified this investigation was meant to "give [Thomas] the benefit of the doubt" and to provide Thomas with "due process", despite the above testimony establishing Respondent had directed Thomas to the LP room under the pretense of a phantom investigation about a harassing customer (TR. 297:7-10; 421:4-6).

[8] Respondent requested that Findon write a statement (entered in evidence as GCX 6) documenting the entire meeting, in response to this ULP charge, during the Board's investigation (TR. 431:18-432:3; GCX 6). Findon also attempted to testify that he was "busy" when he wrote the October 24th statement, and stated that the statement was pulled from memory at the time (TR. 342:4-343:1, 430:21-431:3; GCX 6).

[9] Findon's October 24, 2017 statement firmly states that Thomas requested a "wine garten" representative, and recounts a very similar version of the *Weingarte*n rights from Spicher's card; in that statement, Findon expressly denied Thomas' request (TR.431:18– 432:3; GCX 6). However, after having his memory refreshed by the audio-free security video of the incident within a month of this ULP hearing, Findon testified that he did not "remember" Thomas reading his *Weingarten* rights from Spicher's business card (TR. 303:14–18, RX 17).

terminated, or affect my personal working conditions, I request that my union representative or shop steward be present at this meeting. Without representation, I choose not to answer any questions" (TR. 106:4–12, 296:12–24, 325:4–14, 391:17–20; RX 10, 17 at 7:52:42 p.m.; GCX 6). Findon indicated that his own rule of thumb is to wait up to an hour for a Union representative (TR. 305:1–2, 322:20–25). However, on this occasion, Findon decided that he did not need to wait even that long, because it was a drug and alcohol policy investigation (TR. 313:17–318:3, 315:10–17; GCX 6). Findon also unilaterally determined when Thomas had "enough time" to get a Union representative (TR. 306:21).

Findon did not grant Thomas' request for a Union representative or stop the investigatory meeting to wait for a Union representative (TR. 262:21–22; GCX 6; RX 17 after 7:52:42). Findon just kept reading from the drug and alcohol manual and continued asking Thomas questions as Thomas stood in front of him (TR. 107:10–16, 190:8–9, 331:15–20; RX 17 after 7:52:42). Feeling outnumbered and intimidated, Thomas acquiesced to answer some of Findon's questions about his position and work history at the store (TR. 107:19–24, 158:11–12, 334:13–17; GCX 6; RX 17 after 7:52:42). Thomas left Spicher's business card on the desk next to Findon and walked back across the room and sat down at about 7:54 p.m. (TR. 106:14, 161:11; RX 17 at 7:54:18).

At no time did Thomas rescind his request for Union representation nor did Findon ask Thomas if he would waive his *Weingarten* rights and continue the investigatory meeting (TR. 106:16–18, 108:3–4, 199:4–17, 198:8–21). No one in the LP office offered to help call or find a Union representative at the store, nor was Thomas

allowed to leave the LP office to seek out a Union representative at the store (TR. 261:1–18, 322:1–19, 323:1–19, 346:14–19, 394:14–395:4).[10] At all times while Thomas was in the room, Burroughs and Mentzer guarded the two exit doors, with the door leading to the store floor being closed at all times except to admit Findon or to allow Findon to leave (RX 17).

At about 7:56 p.m., Thomas stood up and walked across the room to retrieve Spicher's business card from the desk, and returned to his seat to read the phone numbers on the card (TR. 106:21; RX 17 at 7:56:44). Thomas again told Findon that he wanted a Union representative present (TR. 392:21–25, 422:18; RX 17 at 7:56:48). No one in the LP office attempted to keep Thomas from using his personal cell phone (TR. 245:4–14, 394:14–16).

Thomas attempted to call Spicher at about 7:57 p.m. but it went straight to voicemail (TR. 43:1–13, 44:17–45:18, 45:1–18, 107:2, 155: 2–13, 156:10–14, 422:18; RX 10, 17 at 7:57:40). Thomas was trying to listen to Findon and simultaneously make the call to Spicher and decided not to leave a message (TR. 43:1–13, 44:17–45:18, 45:1–18, 47:14–18, 48:16–23, 107:2–16, 154:21–155:1–13, 156:10–14, 334:6–12, 422:18; RX 10, 17 after 7:57:40).[11] Spicher did not answer or return Thomas' call for a multitude of reasons: 1) No audible message was left; 2) Spicher did not recognize the Caller ID name or phone number because Thomas had never called her before; 3) It was Sunday evening; and, 4) The Union has a toll free emergency number that

[10] During his testimony, Findon denied that LP officers were guarding the doors to prevent Thomas from leaving; however, Burroughs and Mentzer appeared only to open the outside office doors in response to a knock or signal throughout the interview. (TR. 325:8-19; RX 17)

[11] According to Findon's October 24th statement, Findon explicitly denied Thomas the right to a Union representative (GCX 6). At the hearing – after his memory was refreshed by the audio-free security video - Findon testified that he gave Thomas permission to contact his Union, and even that he gave Thomas (limited) time to contact the Union (TR. 299:12-24, 303:2-16, 315:2-7, 395:3-10).

members can call after regular business hours (TR. 48:16–23, 68:8–12, 70:1–17, 89:5–14; RX 10).

Spicher listened to the three-second long voicemail but could only hear a voice in the background stating, "this is about drugs, alcohol use. You don't have the right to […]" (TR. 48:16–50:6, 68:8–12, 70:1–17, 89:5–14; RX 10; GCX 6). Spicher recognized that it was Findon's voice because she had met with him several times before, but she did not know that he worked at the store on March 26, 2017, because he had transferred there only a few days before (TR. 68:19–25, 73:5–6, 283:22, 283:19–24).

At some point, Findon asked Thomas if he would be willing to open his locker (TR. 108:6–8). Thomas replied that he would be more than happy to open his locker if a Union representative was present (TR. 108:10).[12] Findon again told Thomas that he did not have the right to a representative because it was a drug and alcohol investigation (TR.106:16–18, 108:9–13; GCX 6).

Because this was Findon's first drug and alcohol policy investigation, he had to rely on phone calls and text messages to and from Human Resource Director Mangum to complete the investigation (TR. 395:17-25; GCX 6; RX 27). At about 8:00 p.m., Findon, at Mangum's instruction, left the LP office to find the Drug and Alcohol questionnaire ("questionnaire") (TR. 108:25–109:2, 473:23–474:1, 494:15–21; CPX 1; RX 17 at 8:00:00; RX 27). During the course of their communications during this meeting, Mangum "backed up the manual" and confirmed to Findon that he should "explain to Jason [Thomas] that under the circumstances we did not need the union present" (GCX 6).[13]

[12] Thomas' locker was not searched (TR.338:7–14, 430:16–19).

[13] Findon disclosed this communication in his October 24, 2017 statement to his supervisor (and the Board), and the quotes above come directly from that statement.

After Findon left the LP office, Mentzer and Burroughs continued to stand in front of each of the two LP office doors to block any attempt by Thomas to leave (TR. 109:7–13; RX 17). Mentzer and Burroughs similarly blocked the doors each time Findon stepped out of the LP office throughout the investigatory meeting (TR. 323:11–16; RX 17).

While waiting for Findon, Thomas made calls to the phone numbers on the business card (TR. 154:3–4, 245:4–14; RX 10, 17 after 8:00). For each phone call at that late an hour on Sunday, Thomas was greeted with a recorded message or his calls went straight to voicemail (TR. 107:2–5, 158:13–21, 265:17–266:2; RX 17 after 8:00). Thomas decided not to leave a message each time, but he did keep his phone out to answer or check his voicemail just in case anyone from the Union called him back (TR. 158:13–21, 161:10–12, 183:8–10, 265:17–266:2, 266:5–23; RX 17 after 8:00).

At about 8:07 p.m., when Findon knocked on the locked door to reenter the LP office, Mentzer opened the door for him (TR. 109:19; RX 17 at 8:07). Findon had to knock on the door each time to renter the LP office because the door automatically locks (TR.410:7–411:9; RX 17 at 8:07:08, 8:09:09). Findon was in the office for about two minutes before leaving again for a brief moment to check in again with Mangum (TR. 398:12–16; RX 17 at 8:08:42). Findon reentered the LP office and told Thomas that he wanted to start over (TR. 109:24; RX17 at 8:09:15). Thomas told Findon he would be glad to start over as long as he gets a Union representative (TR. 110:5; RX 17 after 8:09:15).

6. Findon Orders Thomas to Take an Alcohol Test

Findon reminded Thomas that, when hired, he had signed copies of the Drug and Alcohol policy and an employee policy that included consent to a locker and belongings

search (TR. 109:24–110:3, 200:7–9, 405:8–12; GCX 6, RX 17 after 8:09:15). During this timeframe, Thomas tried again to call the numbers on the business card and, as before, left his phone out to answer or check his voicemail just in case anyone from the Union called him back (RX 17 at 8:10:15). Findon continued the investigatory meeting by asking Thomas questions to fill out the questionnaire (TR. 108:15; CPX 1; RX 17 after 8:10:15). Again, being outnumbered, and after having his repeated requests for Union representation rejected, Thomas answered some of Findon's questions (TR.199:4–17, 399:10–23, 427:6–17; GCX 6; RX17 after 8:10:15).

Findon finished the questionnaire but did not include anything about whether he smelled alcohol on Thomas, nor did he record that he or anyone else had seen beer in Thomas' locker (TR. 332:2–18, 400:13–25; CPX 1).[14] At about 8:15 p.m., Mentzer, as instructed by Findon, handed Thomas a copy of the Drug and Alcohol policy that Thomas signed the day he was hired (TR. 110:1, 200:7–9, 402:8–14; CPX 1; RX 6, 17 at 8:15:28). As Thomas was reviewing the policy, Findon stood up and began walking toward Thomas (TR. 406:11–19, 407:7–14; RX 17 at 8:15:32). Findon ordered Thomas to report to a laboratory to take an alcohol test (TR. 110:10, 204:5–18, 302:13–17, 316:9–10,401:8, 407:7–22; GCX 6; RX 17 after 8:15:32).

7. Respondent Again Denies Thomas' Repeated Requests for a Union Representative

Thomas told Findon that he would submit to an alcohol test as long as he had a Union representative (TR. 110:10–17, 204:5–18, 205:17–22, 316:11–12, 318:10–25, 407:16–24, 408:7–9, 422:19–20). Findon, becoming increasingly frustrated, adamantly

[14] During the instant ULP hearing, Findon testified that he smelled alcohol on Thomas breath on March 26, 2017, but failed to mention that detail in either his October 24, 2017 statement or in the above-referenced questionnaire that he filled out the day of the interview (TR. 292:15–16, 320:2–14, GCX 6, CPX. 1, RX 27).

told Thomas "that was not going to happen" (TR. 110:18–20; GCX 6; RX 17 at 8:16:17). Findon did not stop the investigatory meeting or wait for a Union representative to arrive before telling Thomas to submit to an alcohol test (TR. 110:21–111:3, 199:4–17; RX 17 after 8:16:17). At no time did either Thomas rescind his request for Union representation or Findon ask Thomas if he would waive his *Weingarten* rights before submitting to an alcohol test (TR. 106:16–18, 108:3–4, 110:21–111:3, 199:4–17, 198:8–21; RX 17 after 8:16:17). Findon testified that he told Thomas that a Union representative could meet him at the test site "if he got ahold of a union rep" (TR. 305:15–18, 408:9–13).[15]

D. Respondent Suspends Thomas for Refusing to Take an Alcohol Test

Thomas never refused to take the alcohol test, he merely requested a Union representative before he submitted to an alcohol test (TR. 111:17–18, 205:17–22, 408:5–9). Faced with a seemingly unbreakable stalemate, Findon left the LP office at about 8:17 p.m. (GCX 6; RX17 at 8:17:25). Findon again called Mangum to apprise her of the situation and decide how to go forward (TR.302:17–25, 316:13–17, 407:23). Mangum did not tell Findon to stop the investigatory meeting or to wait for a Union representative; instead, Mangum told Findon to suspend Thomas pending investigation if he did not submit to an alcohol test (TR. 294:24–3, 305:22–306:2, 411:10–13, 471:6–8, 472:4–6, 474:2–8).

Findon returned to the LP office at about 8:19 p.m. and informed Thomas that he was being suspended pending investigation because he would not submit to an alcohol

[15] Findon's October 24 statement gives no indication that he provided Thomas with the option to meet a *Weingarten* representative at the testing site (GCX 6). In that statement Findon confirmed, from earlier on in the meeting, he had told Thomas that Respondent "did not need to wait for union representation" (GCX 6).

test (TR. 111:11–19, 208:4–7, 305:22–306:2, 411:15–18; GCX 6; RX 17 at 8:19:41). The investigatory meeting, which had begun at 7:42 p.m., now ended at 8:20 p.m. (RX 17 at 7:42:16, 8:20:27). Findon, Burroughs, and Mentzer escorted Thomas to his locker to collect his belongings (TR. 111:20–112:9, 208:9–11, 411:18–22; GCX 6). Thomas used a combination lock on his assigned locker. His was the first locker from left to right in the middle row of a bank of three vertical lockers (TR.113:5–18, 144:17–20, 413:8).[16] Thomas unlocked his locker and collected his belongings (TR. 113:24). Thomas presented the empty locker to Findon to show him that there was no alcohol inside (TR. 113:22–25, 243:1–9). Findon told Thomas it was too late and proceeded to escort Thomas out of the store (TR. 114:1–6, 411:22; GCX 6).

E. The Events of March 27, 2017

Spicher did not find out until the next day that it was Thomas who had called her Sunday evening (TR. 50:17–21, 121:2–9, 18–19). Spicher testified that, if she had realized that it was Thomas who was calling from the store, she could have been there within twenty minutes (TR. 95:10–16). Spicher also testified that she would have advised Thomas to take the test and make sure that he understood that if the test was positive he has the right to retest (TR. 92:14–24, 94:18–95:2, 492:24–493:6; JX 1: § 18.2; RX 5:33).

1. Thomas Discusses the Details of the March 26, 2017, Meeting with Union Representative Mary Spicher

Thomas spoke to Spicher by phone on March 27, 2017, and told her that he was initially called to the LP office to help identify a potentially troublesome customer (TR.

[16] Although Pinkerton testified that she saw Thomas use the locker above his assigned locker at least once, her March 27, 2017, written statement only refers to Thomas' assigned and locked locker, which she identified as locker #91 (TR. 353:6–354:5, 355:25, RX 2).

121:12–15). Thomas then informed Spicher that the real reason he was called into the LP office was that he was suspected of drinking on the clock (TR. 121:16). Thomas also told Spicher that he had requested a Union representative, but was denied (TR. 121:17).

2. Spicher Arranges a Meeting with Thomas and Mangum

Thomas called Spicher on March 30, 2017, to inform her that Mangum wanted to meet with him (TR. 52:9–12, 53:4–10). Spicher told Thomas that she would set a date for the meeting and would let him know when to be there (TR. 53:17–24). Spicher called Mangum to set up the meeting (TR. 53:21). During the telephone conversation with Mangum, Spicher specifically asked if Thomas was being terminated and, if so, why? Mangum responded that the reason for termination was failure to take a drug test, and gave no other reasons (TR. 54:6–15).

F. Thomas' Discharge Meeting on March 31, 2017

The meeting took place on March 31, 2017 in Mangum's office at the store (TR. 52:1–8, 54:16–55:4,122:19). Thomas, Spicher, and Mangum attended (TR. 52:1–8, 54:16–55:4, 122:19–21). At the meeting, Mangum informed Thomas that he was discharged and gave him his final paycheck (TR. 55:15–24, 122:22–23). Mangum did not tell Thomas the reason Respondent was discharging him (TR. 55: 20–22, 124: 3–6).

As noted previously, Mangum had been aware that Thomas had requested Union representation before refusing the alcohol test, as Mangum herself had commanded Findon to suspend Thomas if he continued to object to an unrepresented test (TR. 294:24–3, 305:22–306:2, 411:10–13, 471:6–8, 472:4–6, 474:2–8; GCX 6). There is no dispute that Respondent's managers, including Mangum and Findon, are familiar with the tenets of *Weingarten* rights (TR. 283:7–16, 305:1, 434:15–21). Further,

Mangum did admit to Thomas that the situation should have been handled better and that Respondent planned to provide more training to managers about *Weingarten* rights (TR. 123:1–6).

G. Respondent's Further Admissions that it Discharged Thomas for Refusing to Take an Alcohol Test

After the meeting, Thomas asked Spicher why he had been discharged. Spicher told Thomas that Mangum had informed her the day before that it was for failure to take a drug test (TR. 57:20–58:2). Thomas responded that he did not refuse to take a drug test; he just refused to participate without a Union representative (TR. 58:3–5). Respondent gave the Union no other reason for Thomas' termination other than failure to take a drug test (TR. 19:17–20:5, 54:6–15, 64:18–65:11, 476:14–17; GCX 3; CPX 1).

On April 7, 2017, Spicher filed a grievance over Thomas' discharge (TR. 58:6–8; GCX 2). In the grievance, the Union specifically asked Respondent to "respond in writing … with a clear and complete statement of the reasons for the member's discharge" (GCX 2). The Union also asked the respondent to provide "Copies of all other evidence considered by the Employer when it decided it had cause to terminate the grievant's employment" (GCX 2; CPX 1).

In its response by a faxed letter dated April 26, 2017, Respondent denied the grievance and stated that Thomas was suspended and discharged for "violation of Company policy. Specifically, Grievant violated the Company's policy on Alcohol and Drug use when he refused to submit to a drug and alcohol test" (TR. 87:16–25, 438:20–23, 476:14–17; GCX 3; CPX 1).

Respondent also provided a copy of the drug and alcohol questionnaire that Findon prepared even after Thomas had asked for a Union representative as well as

copies of Respondent's Policy on Alcohol and Drug Use and Associate Responsibilities that Thomas signed the day he was hired (CPX 1; RX 6, 8). The Respondent also provided a copy of Pinkerton's March 27, 2017, handwritten statement about an event that she claims occurred on March 25, 2017,[17] and a copy of Mangum's typed statement about the March 31, 2017, termination meeting (CPX 1).

Finally, Mangum admitted at hearing that she made the final decision to suspend and subsequently discharge Thomas, and that it was based solely on Findon's phone calls, the questionnaire, and Thomas' refusal to take an alcohol test (TR. 438:20–23, 462:12–23, 476:14–25). Interestingly, once Mangum admitted that Thomas was discharged because he "decided not to take the drug test," Respondent abruptly stopped direct questioning and, for the first time, announced that its Counsel could not stay in the hearing room past 5:00 p.m. that day (TR. 476:14–477:1). That was followed the next day by Respondent inexplicably implying that Mangum did not feel safe to testify accurately because she somehow felt intimidated by the General Counsel and the Administrative Law Judge (TR. 484:16).

III. RESPONDENT VIOLATED § 8(a)(1) BY DENYING THOMAS' REQUEST FOR UNION REPRESENTATION DURING ITS INVESTIGATORY INTERVIEW ON MARCH 26, 2017

Under long established precedent, it is clear that Respondent violated § 8(a)(1) of the Act when, on March 26, 2017, Manager on Duty Findon denied Thomas' request for Union representation during an investigatory interview in violation of his *Weingarten* rights. It is equally clear that under current Board law Respondent violated § 8(a)(1) of the Act by denying Thomas' request for Union representation before submitting to an

[17] Pinkerton alleges that she saw Thomas in front of an open locker (the one above his own locker) with at least one beer can inside it.

alcohol test. Each of these will be addressed after a discussion of the legal standards.

A. Legal Standards

It is well settled that § 7 of the Act embodies the statutory right of an employee in a unionized workplace to refuse to submit, without union representation, to an investigatory interview by his employer that may reasonably lead to discipline. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256–57 (1975); *IBM Corp.*, 341 NLRB 1288 (2004). As the Supreme Court stated, "it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's requests and compels the employee to appear unassisted at an interview which may put his job in jeopardy."[18] *Weingarten,* 420 U.S. at 257 (quoting *Mobil Oil Corp.*, 196 NLRB 1052 (1972)). As such, an employee's *Weingarten* rights arise when: 1) the employer requests to interview the employee as part of an investigation; 2) the employee reasonably believes that the investigation could result in disciplinary action being taken against him; and 3) the employee requests union representation. *Id.* at 275. *See also New Jersey Bell Tel. Co.*, 300 NLRB 42, 48 (1990).

Once an employee makes a valid request for a union representative, the employer must: 1) grant the request; 2) discontinue the interview; or 3) offer the employee the choice of a meeting without a representative or of no meeting at all. *Postal Service*, 241 NLRB 141 (1979). An employer would still be free to take disciplinary action based on the information it has apart from that gleaned during the

[18] In fact, the presence of a union representative serves to safeguard not only the particular employee's interest, but also the interests of the entire bargaining unit against an employer imposing punishment unjustly. *Weingarten,* 420 U.S. at 260–61 ("the representative's presence is an assurance to other employees… that they, too, can obtain his aid and protection if called upon to attend a similar interview").

desired investigatory interview. *See e.g.*, *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982); *Super Valu Stores, Inc.*, 236 NLRB 1581, 1591 (1978). However, an employer violates the Act by discharging an employee because he has exercised his *Weingarten* rights. *Safeway Stores, Inc.*, 303 NLRB 989 (1991); *Salt River Valley Water Users' Assn.*, 262 NLRB 970 (1982); *Spartan Stores*, 235 NLRB 522 (1978).

Further, once the rights are invoked, if an employer goes beyond merely informing the employee of a previously made disciplinary decision,

> the full panoply of protections accorded the employee under *Weingarten* may be applicable. Thus, for example, were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, *or to attempt to have the employee admit his alleged wrongdoing* or to sign a statement to that effect . . . the employee's right to union representation would attach.

Baton Rouge Water Works Co., 246 NLRB 995, 997 (1979) (emphasis in original). *See also PAE Aviation*, 366 NLRB No. 95 (2018).

The Board has held that the type of "interviews" to which *Weingarten* rights apply are not limited to verbal exchanges between an employee and his employer, but rather can also include a physical examination of the employee in furtherance of the employer's inquiry into the employee's suspected misconduct. *See, e.g., Safeway Stores, Inc.*, 303 NLRB 989 (1991). This includes drug testing.[19] *Id.; System 99*, 289 NLRB 723 (1988) (violation for having denied an employee's request for union representation before he submitted to an alcohol sobriety test, which is "investigatory"

[19] In *Safeway*, the Board adopted the administrative law judge's findings that the employer violated § 8(a)(1) of the Act by denying the employee's request for union representation before submitting to an employer mandated drug test as part of a larger investigation and by suspending and terminating the employee because he refused to submit to the drug test without his union representative present. The Board held that in the absence of a union steward at the facility at the time of the interview, the employer was obligated to respect the employee's request, even if it meant delaying the requested drug test. *Safeway Stores, Inc.*, 303 NLRB 989, 996 (1991).

because it was mandated by the employer as part of an investigation into whether the employee had come to work intoxicated). The Board has recently affirmed its commitment to the principle that the employee protections of *Weingarten* do apply in these situations.

In *Ralph's Grocery Co.,* 361 NLRB No. 9 (2014), the Board held that an employer violated the Act when it discharged an employee who refused to submit to a drug test without first consulting a union representative, as was requested, because the refusal to submit to a drug test was "inextricably" linked to the employee's assertion of *Weingarten* rights. Similarly, in *Manhattan Beer Distributors, LLC.*, 362 NLRB No.192 (2015) (citations omitted), the Board held that "where an employer insists that an employee submit to a drug and/or alcohol test as part of an investigation into an employee's alleged misconduct, the employee has a right to union representation before consenting to take the test."

The Board's decisions in these four cases cited above—*Safeway*, *System 99*, *Ralph's Grocery*, and *Manhattan Beer*—are the only cases in which the Board has considered the issue of whether an employer's request that an employee submit to drug or alcohol testing implicates *Weingarten* rights. In each instance, the Board affirmed that *Weingarten* rights attach to drug and alcohol testing. Further, the Board has determined that a make whole remedy is appropriate if a violation is found because the employee's discharge is a direct result of his invocation of his *Weingarten* rights. *Ralph's Grocery Co.,* 361 NLRB No. 9 (2014); *Manhattan Beer Distributors, LLC.*, 362 NLRB No.192 (2015).

Finally, the fact that an employee may answer questions does not constitute a waiver of his *Weingarten* rights. "It should not be requisite of union representation that the lone employee further antagonize the employer and jeopardize his job by walking out of the meeting or refusing to answer questions." *Westside Comm. Mental Health Ctr., Inc.*, 327 NLRB 661, 665–66 (1999). *See Southwestern Bell Tel. Co.*, 227 NLRB 1223 (1977); *Super Valu Store*, 236 NLRB 1581, 1591 (1978).

B. Respondent Violated § 8(a)(1) When it Denied Thomas' Request for Union Representation During Its Investigatory Interview

As discussed above, there are three predicates to applying *Weingarten*: 1) the employer requests to interview the employee as part of an investigation; 2) the employee reasonably believes that the investigation could result in disciplinary action being taken against him; and 3) the employee requests union representation. There is no dispute that Respondent summoned Thomas for an investigation that could, and did, lead to his discharge. In fact, it summoned Thomas to that very investigation under false pretenses. Thus, application turns on the remaining two factors.

1. Thomas Reasonably Believed that Respondent's Investigatory Interview Could Result in Discipline and then Clearly and Unequivocally Requested Union Representation

Thomas may not have been fully aware of the exact CBA provisions and Respondent's policies dealing with drug and alcohol, but he was aware they existed in some form since Respondent informed him upon his hire that employees under the influence of alcohol while at work are subject to termination. Thus, once Thomas learned the true reason for his presence in the LP office, there is no doubt that he reasonably believed and was fully aware that Respondent's drug and alcohol policy investigation into his suspected alcohol use could lead to discipline, including discharge.

It is for this reason that he asked for Union representation and pulled out the card given to him by the Union to read aloud from it, clearly invoking his *Weingarten* rights. The video evidence confirms this: Thomas repeatedly and unambiguously requested a Union representative be present before answering Respondents' alcohol-related questions during its investigation of him.

2. Respondent Denied Thomas His Right to Have Union Representation Present

Weingarten contemplates the physical presence of a union representative during an investigative interview, not merely a phone conversation with a representative, to protect § 7 rights. 420 U.S. at 256–57. *See also IBM Corp.*, 341 NLRB 1288 (2004). In-person representation is needed in order to ensure that the employee receives "active assistance." *Washoe Med. Ctr*, 348 NLRB 361 (2006), *citing Barnard College*, 340 NLRB 934 (2003). To the extent Respondent may have thought any "active assistance" from a Union representative would have been useful is irrelevant. It is not Respondent's place to determine the utility of an employee's exercise of § 7 rights: an employee's exercise of *Weingarten* rights "is not subject to the employer's agreement that the exercise would be worthwhile." *System 99*, 289 NLRB at 727.

Active assistance from a Union representative could, in fact, have benefited Thomas in several ways here. As an initial matter, the representative could have challenged the fact that there was no second person who had corroborated the suspicion of alcohol use, which was required under Respondent's own protocol. That would have ended the investigation before it began.

Further, even if the investigation had proceeded, a Union representative could have made his or her own independent observations of Thomas' appearance and

behavior such that Respondent's reasonable suspicion determination could have been challenged or confirmed. The representative could also have helped to expedite the meeting and helped mitigate the coerciveness of the situation by having the door-guarding officers removed.

Moreover, the representative could have ensured that, if Thomas did have an alcohol issue to be addressed, Thomas understood that help was available through the EAP program and that options existed other than discharge. Finally, a Union representative being present would have protected the interests of the entire Unit against Respondent's unjust administration of its drug and alcohol policy. *See Weingarten,* 420 U.S. at 260–61. Thus, to the extent Respondent may argue that it satisfied Thomas' *Weingarten* rights by leaving him with his phone and allowing his calls to attempt to reach Spicher, it would be mistaken.

Even if Thomas had been able to reach Spicher telephonically, Respondent would still not have met its legal obligation under *Weingarten*. The Board has found that actually conferring with a union representative over the phone is insufficient to fully satisfy an employee's *Weingarten* rights; an employee must have the right to in person representation. *Manhattan Beer*, slip op. at 3. Without the "physical presence" of a Union representative, Respondent had no right to continue investigating and questioning Thomas. *Id*.

While Thomas admittedly should have left a message for Spicher, who probably could have been able to come in person within 20 minutes, both the circumstances of his enforced confinement to the LP office and Respondent's complete failure to follow proper protocol bordered on abusive. First, Respondent physically barred Thomas from

leaving the LP office by having Loss Prevention officers guarding the doors at all times during the investigation. That does not create an environment that fosters the most logical and rational thought processes for those being interrogated. *Standard-Coosa-Thatcher, Carpet Yarn Div.*, 257 NLRB 304, 311 (1981) (violative conduct "made even more coercive by the context in which it occurred, mandatory attendance in a locked room").

Second, Respondent made no attempt to honor Thomas' repeated requests for representation. This deprived him of the active assistance discussed above. Moreover, once Thomas invoked his right to representation, Respondent was legally bound to grant the request, discontinue the interview, or offer Thomas the choice of a meeting without a representative or of no meeting at all. *See Postal Service*, 241 NLRB at 141.

Third, it made no effort to contact any Union stewards potentially working on March 26, 2017, despite Thomas asking about getting a steward. Finally, Respondent did not even follow its own protocol in waiting the usual one hour for a representative. As such, Respondent's investigation of Thomas without his having a Union representative physically present was unlawful.

3. Thomas Did Not Waive His Right to Union Representation

While Mangum may agree that further *Weingarten* training is in order and her own conduct supports this (*e.g.,* her mistaken belief that Respondent's policy obviated the need for a Union representative in Thomas' interview), there is no doubt that Respondent's managers, including Findon, are all familiar with *Weingarten* rights. There is also no doubt that, despite this knowledge, Findon affirmatively and repeatedly denied Thomas' right to a Union representative. In fact, Findon, who was used to waiting the requisite one hour for Unit employees who invoke their *Weingarten* rights,

couldn't even be bothered to do that – his entire investigation of Thomas lasted less than forty minutes.

The fact that Thomas answered some questions or filled out parts of the questionnaire during the interview under these circumstances does not afford Respondent any reprieve. Thomas was in the difficult position of potentially choosing to either refuse to answer completely or walking out, given Respondent's repeated denials. As set forth earlier, the Board has recognized that he could not have waived his *Weingarten* rights by answering some questions in this situation. *See Westside Comm. Mental Health Ctr., Inc.*, 327 NLRB at 665–66; *Southwestern Bell Tel. Co.*, 227 NLRB at 1223; *Super Valu Store*, 236 NLRB at 1591. Thus, there could be no waiver.

C. Respondent Violated § 8(a)(1) when it Denied Thomas' Request for Union Representation before Submitting to an Alcohol Test in Violation of His Weingarten Rights

Findon instructed Thomas to submit to an alcohol test because he did not believe that he had just cause to discipline Thomas based merely on a suspicion of being under the influence of alcohol; he believed a test would either confirm or disprove his suspicion that Thomas was under the influence of alcohol at work. Thus, Respondent's desire for Thomas to submit to an alcohol test was not a drug or alcohol test "standing alone," but rather, was part and parcel of Respondent's investigation of whether Thomas was under the influence.[20] In line with the Board's decisions in *Safeway Stores*, *System 99*, *Ralph's Grocery*, and *Manhattan Beer*, that means he was entitled to Union representation.

[20] This distinguishes the alcohol test in this case from the type of "fitness for duty" test to which the Board has held *Weingarten* rights do not apply. *See U.S. Postal Service*, 252 NLRB 61 (1980) (insufficient evidence that medical examination ordered by the employer was undertaken to form the basis of discipline).

1. The Alcohol Test Mandated by Respondent on March 26, 2017 was an Investigatory Interview to Which *Weingarten* Rights Attached

No genuine distinction can be drawn between Respondent's investigation in this case and the investigations the employers conducted in *Safeway,*[21] *System 99*, *Ralph's Grocery*, and *Manhattan Beer*. In fact, *System 99*, *Ralph's Grocery*, and *Manhattan Beer* all involved investigations due to issues on a particular day, like Thomas on the day he was ordered to submit to an alcohol test. Therefore, in light of this precedent, Respondent's demand that Thomas submit to an alcohol test on March 26, 2017, constituted an investigatory interview within the meaning of *Weingarten*.

2. Thomas Again Clearly Requested Union Representation for the Test and Respondent Unlawfully Insisted on Proceeding

There is no dispute that Thomas reasserted his *Weingarten* rights before he would submit to an alcohol test. The record, both through testimony and video, firmly establishes that Thomas repeatedly and unambiguously requested to have a Union representative present before he would acquiesce to Respondent's demand that he submit to an alcohol test. Thus, as discussed previously, Respondent was legally bound to grant the request. Otherwise, Respondent needed to either discontinue its insistence on the test or offer Thomas the choice of a having the test without a representative. *See Postal Service*, 241 NLRB at 141. Respondent failed to meet its legal obligation.

Aside from the impact Respondent's unlawful conduct had on Thomas personally, there is a farther reaching harm. The Union and Respondent agreed to contractual restrictions on Respondent's ability to test employees for drugs or alcohol in

[21] Although the investigation in *Safeway* concerned an ongoing absenteeism issue, not just a particular day as is the case here, that issue was intertwined with the alcohol investigation.

the CBA. If Respondent were to routinely require employees to submit to "reasonable suspicion" drug or alcohol testing without Union representation, then there would be effectively no check on Respondent's alleged reasonable suspicion determinations, in abrogation of the parties' CBA. This undermines collective bargaining and undercuts the Union as the Unit's exclusive collective bargaining representative. As discussed in *Weingarten*, having a Union representative present for Thomas in this particular instance would have served the interests of the entire bargaining Unit by protecting against Respondent's unjust administration of its drug and alcohol testing policy. *Weingarten, Inc.*, 420 U.S. at 260–61.

As here, the Union could also protect the Unit by ensuring whatever protections were available could be employed. Using Thomas' situation as an example, the presence of a Union representative in the LP office or the test site could have provided him with the following additional safeguards against such things as: improper questioning by Findon, especially if, as was intended, Findon was to drive Thomas to the test site, and Thomas not having been advised he had the right to retest if he were to take the test and fail.

D. Respondent Suspended and Subsequently Terminated Thomas Because He Asserted His *Weingarten* Rights

The CBA afforded Respondent the right to terminate Thomas' employment if it had just cause to conclude that Thomas was, in fact, under the influence of alcohol at work. It did not. There were not even the two requisite management observers to justify the investigation to begin with. Then, Findon did not either have or develop the necessary just cause based upon his own observations during the drug and alcohol policy investigation. Rather, Findon sought to confirm or disprove his suspicion by

having Thomas submit to the alcohol test. Thus, it is clear that Respondent did not suspend and subsequently discharge Thomas because it had determined that he was actually under the influence of alcohol—it did so because of Thomas' refusal to submit to the alcohol test without first consulting a Union representative.

It admitted as such. First, Mangum informed Spicher that the only reason Thomas was being discharged was for failing to take a drug test. Second, in response to the grievance over Thomas' discharge, Respondent stated that Thomas was suspended and discharged for having "violated the Company's policy on Alcohol and Drug use when he refused to submit to a drug and alcohol test." Finally, Mangum admitted at hearing that she made the final decision to suspend and subsequently discharge Thomas, and that it was based solely on Findon's phone calls, the questionnaire, and Thomas' refusal to take an alcohol test.

Because Findon's phone calls occurred during the investigatory interview without the requested Union representative present, the questionnaire was administered and answered without the requested Union representative present, and Thomas' refusal to take an alcohol test was because a Union representative was not present, it is beyond clear that Respondent's decision to discharge Thomas was inextricably intertwined with his invocation of *Weingarten* rights. As such, his discharge was unlawful under *Safeway Stores*, *System 99*, *Ralph's Grocery*, and *Manhattan Beer*.

E. Any Issues Involving Credibility Should Be Resolved In Favor of the General Counsel

In determining whether Respondent engaged in unfair labor practices as alleged in the Complaint, the ALJ must make certain credibility determinations. Credibility determinations are based on the weight of the respective evidence, established or

admitted facts, inherent probabilities, and reasonable inferences, which may be drawn from the record as a whole. *See Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996); *Medeco Security Locks, Inc.*, 322 NLRB 664 (1996). *Accord Warren L. Rose Castings, Inc*., 231 NLRB 921, 923 (1977), *enfd.* 387 F.2d 1006 (9th Cir. 1978). Thus, a close examination of the credible facts, the reasonable inferences drawn from those facts, and the inherent probabilities of the respective versions of the events, and the record as a whole shows that the credibility issues should be resolved in favor of the General Counsel's witnesses and against Respondent's witnesses.

The Board recognizes the familiar rule that, "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *Int'l Automated Machines*, 285 NLRB 1122, 1123 (1987), *enfd.* 861 F.2d (6th Cir. 1988). This is particularly true where the witness is an agent of a party. *Roosevelt Mem. Med. Ctr.*, 348 NLRB 1016, 1022 (2006). Specifically, the Board will infer that such a witness, if called, "would have testified adversely to the party on that issue." *Id*. *See also Flexsteel Industries*, *Inc.,* 316 NLRB 745, 758 (1995).

Viewed through this lens of credibility, it is clear that Respondent cannot prove that it discharged Thomas for any other reason than his refusal to take the alcohol test without Union representation after not fully participating in the interview due to his invoked *Weingarten* rights being denied. First, there is the credible testimony of Mangum, which was replete with admissions as to the reason for discharge as discussed above. Her credibility will be addressed last. Second, there is Respondent's failure to call three witnesses: Chavarria, who purportedly smelled alcohol on Thomas,

and the two LP officers, both of whom were physically present for the events at issue. Third, there is the testimony of Findon himself, which is at odds with both his prior statements and the video evidence.

1. An Adverse Inference Should be Drawn Against Respondent for Its Failure to Call Person in Charge Patty Chavarria and Loss Prevention Employees Dylan Burroughs and Shawn Mentzer to Testify

Chavarria's observations instigated Findon's investigation of Thomas in the LP office for alcohol use. Specifically, it was supposedly she who smelled alcohol and/or received a report from Pinkerton about Thomas drinking at his locker before March 25, 2017. Those assertions remain uncorroborated.[22] It was also Chavarria who escorted Thomas to the LP office after telling him he was needed to help identify a troublesome customer. Her deceit in this regard stands unrebutted. As Respondent did not call Chavarria to testify, adverse inferences should be drawn.

Similarly, even though Burroughs and Mentzer were present for and observed first-hand the Thomas investigation on March 26, 2017, Respondent did not call either to testify at the hearing in this matter. Specifically, Respondent did not call Burroughs or Mentzer to corroborate Findon's testimony as to Thomas' use of the Spicher's business card and repeated requests for a Union representative, which strongly suggests that neither would have been able to credibly corroborate Findon.

Respondent also failed to corroborate Findon's testimony as to the following by not calling Burroughs or Mentzer: 1) who showed Findon a locker with beer cans; 2) whether Thomas smelled of alcohol in either the checkstand area or in the LP office; and 3) what Thomas was told about riding to the lab for the alcohol test and whether a

[22] In fact, Pinkerton completely failed to corroborate that she had informed management that she purportedly smelled alcohol on Thomas before his February 19, 2017 injury, as reported in RX 11.

Union representative could meet them at the lab. As such, the appropriate adverse inferences should be drawn.

2. The Testimony of Sean Findon Should be Discredited

The propriety of drawing the requested adverse inferences above is heightened given the incredible nature of Findon's testimony, which was refreshed after viewing an audio-less video. In fact, his testimony, when compared either to the October 24, 2017, statement submitted to the Board during the investigation of this matter or to his March 26, 2017, questionnaire for Respondent about the events at issue, falls far short.

For example, Findon testified that he smelled alcohol on Thomas breath on March 26, but failed to mention that detail in either his statement or in the questionnaire he filled out the day of the event. Further, Findon's testimony that he gave Thomas time to contact the Union, even waiting for that, and did not do anything to discourage Thomas from having Union representation, also contradicts his statement. In addition, he testified that he told Thomas the Union representative could meet them at the lab—an assertion conspicuously missing from his statement.

Given that Findon was repeatedly impeached[23] by his statement and questionnaire, both should be found substantially more reliable than his testimony. Findon prophylactically tried to discourage this finding by explaining he was "busy" when he wrote the statement, and that he had simply pulled it from memory. However, Findon himself belied that assertion by admitting he had written the statement after being ordered to by his supervisor in order to respond to the instant Board charge. In other words, when directly confronted by his supervisor with formal allegations of having denied Thomas his *Weingarten* rights, Findon admitted in his statement that Thomas

[23] *See, e.g.,* TR. 313:17–25, 315:7–20, 317:3–25, 319:14–16; GCX 6.

had made a “wine garten” request, that he had consulted Mangum about the request, and that both he and Mangum had agreed Thomas was not entitled to a *Weingarten* representative.

Finally, even apart from these testimonial inconsistencies from his prior written statements, Findon’s testimony, at times, bordered on the absurd. For example, his assertions that the investigation was meant to give Thomas the “benefit of the doubt” and provide him with “due process” is directly at odds with the fact that Thomas had to be tricked into the LP office under false pretenses, an unrebutted fact. That Findon denied on the stand that LP officers were guarding the doors to prevent Thomas from leaving, even though the entire video makes it very clear that Burroughs and Mentzer were doing just that, is simply incredulous. As such, Findon should not be found to be a credible witness.

3. The Testimony of Lydia Mangum Should be Credited

In contrast to Findon, Mangum, despite having been in the hearing room for the duration of the hearing as Respondent’s designated essential witness, was forthcoming and credible. In fact, her candor seemed to have thrown Respondent’s counsel. For as soon as Mangum admitted on the stand that Thomas was discharged because he “decided not to take the drug test,” Respondent abruptly stopped direct questioning and, for the first time, announced that its Counsel could not stay in the hearing room past 5:00 p.m. This was followed up the next day with an inappropriate implication that Mangum did not feel safe to testify accurately because she somehow felt intimidated by the General Counsel and the Administrative Law Judge.

IV. RESPONDENT MUST OFFER REINSTATEMENT AND BACKPAY TO THOMAS

Respondent violated § 8(a)(1) of the Act by denying Thomas' request for Union representation during an investigatory interview that could and did result in the most extreme form of discipline and then, by its own admission, Respondent discharged Thomas, at least in part, for asserting his *Weingarten* rights by refusing to take the drug test without his Union representative. A make-whole remedy is appropriate where, as here, the General Counsel has established, in addition to the denial of *Weingarten* rights, a separate violation that the employee was disciplined, at least in part, for asserting his *Weingarten* rights. *Barnard College*, 340 NLRB 934, 936 n.12 (2003). As such, the appropriate remedy must require Respondent to offer Thomas reinstatement, backpay, and reasonable consequential damages. *Id.; Manhattan Beer Distributors, LLC*, 362 NLRB No.192 (August 27, 2015) (reinstatement and backpay warranted because discharge was a direct result of invocation of *Weingarten* rights). *See also Safeway Stores, Inc.*, 303 NLRB 989, 989–90 (1991) (ordering reinstatement and backpay for employee who was discharged for refusing to submit to a drug test without union representation).

V. CONCLUSION

In light of the above and the record as a whole, General Counsel respectfully submits that Respondent violated § 8(a)(1) of the Act as alleged by: 1) unlawfully conducting an investigatory interview despite having denied Thomas' request for Union representation; 2) unlawfully suspending Thomas for refusing to submit to an alcohol test despite having denied that employee's request for Union representation before

submitting to an alcohol test; and 3) unlawfully discharging Thomas because he refused to submit to an alcohol rest during the interview in which the employee was denied Union representation. Accordingly, the General Counsel respectfully urges that the Administrative Law Judge order Respondent to remedy these unfair labor practices and post a Notice to Employees, as well as any other remedies deemed appropriate. A proposed Order and Notice are appended.

DATED at Portland, Oregon, this 11th day of June, 2018.

Respectfully submitted,

Kristin E. White

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PROPOSED ORDER

Respondent, Fred Meyer Store, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

   (a) Requiring employees to continue to participate in investigatory interviews when they have requested to have a union representative present.

   (b) Requiring employees to submit to a drug or alcohol test as part of an investigation into their behavior or conduct when they have requested to have a union representative at the investigatory interview.

   (c) Discharging employees because of their refusal to submit to such a drug or alcohol test without having a union representative at the investigatory interview.

   (d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

   (a) Within 14 days' of the date of the Board's Order, offer Jason Thomas full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

   (b) Make Jason Thomas whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, including consequential damages, in the manner set forth in the remedy section of this decision.

   (c) Compensate Jason Thomas for the adverse tax consequences, if any, of receiving a lump–sum backpay award, and file a report with the Social Security Administration allocating backpay award to the appropriate calendar quarters.

   (d) Within 14 days from the date of this Order, remove from its files any reference to Thomas' unlawful discharge, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

   (e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other

records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Hollywood Store Portland Oregon facility, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 26, 2017.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL let you have a steward or union representative present, upon request, when you are questioned and believe that the questioning may lead to discipline.

WE WILL NOT fire you because you assert your right to have a union representative present when we require you to take a drug or alcohol test.

WE WILL offer Jason Thomas immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and/or privileges previously enjoyed.

WE WILL pay Jason Thomas for the wages and other benefits he lost, including consequential damages, because we fired him.

WE WILL remove from our files all references to the discharge of Jason Thomas and **WE WILL** notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

Fred Meyer Stores, Inc.

(Employer)

Dated: _____ **By:** _____

(Representative) (Title)

19–CA–206136

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret–ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's

toll–free number 1–866–667–NLRB (1–866–667–6572). Hearing impaired persons may contact the Agency's TTY service at 1–866–315–NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

1220 SW 3rd Ave., Ste. 605
Portland, OR 97204

Telephone: (503)326–3085
Hours of Operation: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Counsel for the General Counsel's Brief to the Administrative Law Judge was served on the 11th day of June, 2018, on the following parties:

E-file:

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National Labor Relations Board
Division of Judges
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